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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LINDSAY KAMAKAHI and JUSTINE LEVY, individually, and on behalf of themselves and all others similarly situated, Plaintiffs, v. AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE and SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGY, Defendants.	Case No. 3:11-CV-1781-JCS **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' ADMINISTRATIVE MOTION TO STRIKE DEFENDANTS' UNTIMELY MOTION TO EXCLUDE THE OPINIONS OF DR. HAL J. SINGER ON CLASS CERTIFICATION**

Defendants American Society for Reproductive Medicine ("ASRM") and Society for Assisted Reproductive Technology ("SART") (collectively, "Defendants") submit this memorandum in opposition to Plaintiffs' Administrative Motion to Strike Defendants' Untimely Motion to Exclude the Opinions of Dr. Hal J. Singer on Class Certification ("Pls. Adm. Mot.").

INTRODUCTION

Plaintiffs' motion declares that "Deadlines and rules exist for a reason." Pls. Adm. Mot. at 1. Yet Plaintiffs never identify any applicable deadline, whether in a rule or court scheduling order, rendering untimely Defendants' motion challenging the admissibility of the opinions of their expert, Dr. Hal J. Singer. Stripped of its rhetoric, their argument rests on Local Rule 7-3(d)(1), which concerns challenges to evidence submitted on a reply brief. But Defendants' motion to exclude Dr. Singer's opinions does not contest the merits of Plaintiffs' class certification motion. It challenges under Rule 702 of the Federal Rules of Evidence the admissibility of *any* of Dr. Singer's opinions Plaintiffs have offered in support of that motion. The inquiry on Defendants' motion to exclude is different, as are the legal standards governing its resolution, from Plaintiffs' request for class certification. It is a separate motion. Local Rule 7-3(d)(1), therefore, does not apply.

Without any basis for contesting the timeliness of Defendants' filing, Plaintiffs retreat to two other contentions: (1) the motion is "unfairly prejudicial"; and (2) the motion amounts to additional argument on class certification. On the first, it is impossible to see how the motion is prejudicial at all. Plaintiffs have had more than 15 months to conduct fact discovery in the case and prepare expert reports. *See* Dkt. #81 (initial scheduling order opening discovery on July 1, 2013 and closing discovery on October 20, 2014); *see also* Dkt. 113 (amended scheduling order retaining October 20, 2014 fact discovery cutoff). They surely expected to defend their expert's work. In any event, the Local Rules give Plaintiffs an opportunity to oppose the motion.

The second repeats the untimeliness argument. But Plaintiffs' conflation of an evidentiary motion with a class certification motion fares no better here. Admissibility is determined by reference to what the evidence is offered to prove. By definition, motions contesting the admissibility of evidence on class certification will reference the elements of Rule 23. That fact does not convert an evidentiary objection into a substantive contention, for then every evidentiary objection would collapse into a question on the merits. Plaintiffs' motion should be denied.

ARGUMENT

I. DEFENDANTS' MOTION IS TIMELY

Plaintiffs make four points in support of their timeliness argument, but only one is even plausibly relevant to the issue.[1] Plaintiffs' note that Local Rule 7-3(d)(1) requires that objections to reply evidence "must be filed and served not more than 7 days after the reply was filed." That contention assumes that Defendants' motion to exclude Dr. Singer's opinions is a further response to Plaintiffs' class certification motion because Local Rule 7-3(d)(1) applies only to evidence submitted on a reply brief. That assumption is demonstrably wrong. Defendants' challenge to the admissibility of Dr. Singer's opinions is a separate and distinct motion from Plaintiffs' class certification motion. The legal issues on the two motions are distinct: Plaintiffs' class certification motion requires that they demonstrate the well-known prongs of Rule 23: numerosity, commonality, typicality, adequacy, predominance and superiority. Defendants' motion to exclude Dr. Singer's opinions tests whether his work is based on a reliable methodology and is applied reliably to the facts. *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993). No doubt Defendants' motion references what Plaintiffs must prove to obtain class certification because every evidentiary objection must be analyzed in the context of the factual question in issue and whether the evidence tends to establish or refute the fact. But if that converted evidentiary objections into arguments about the merits of a legal issue, the Federal Rules of Evidence would be superfluous.

The folly of Plaintiffs' reading of Local Rule 7-3(d)(1) is manifest by the absurd result it would have in practice. Were Plaintiffs correct, Defendants would have had a mere seven days to read and digest Dr. Singer's reply class certification report, which spanned 83 pages. They then would have been limited to a five-page challenge to it. Defendants would have also been required to file a *Daubert* motion before the filing of Plaintiffs' reply memorandum – Plaintiffs do not say when – to challenge Dr. Singer's initial report. In other words, Plaintiffs' approach would force two *Daubert* challenges: one upon the submission of the initial report and another when a reply report is submitted. Local Rule 7-3(d) does not mandate this Rube Goldberg procedure or require parties to inundate the Court with multiple filings on the same issue.

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[1] Plaintiffs' first and fourth contentions – that Defendants were required to file a motion for leave and any motion for leave would have been denied, Pls. Adm. Mot. at 2 – *assume* the motion is untimely. Since the question to be decided here is whether Defendants' motion is, in fact, untimely, those points add nothing to the argument.

Plaintiffs' contention that nothing in the scheduling order authorizes Defendants' motion is also unavailing. This argument is makeweight; notwithstanding the silence of the scheduling order, Plaintiffs filed their own *Daubert* motion to exclude the opinions of Dr. Insoo Hyun, one of Defendants' experts. Dkt. #133. It also misperceives the function of scheduling orders, which establish general deadlines for cases. They do not authorize every particular motion because courts and litigants cannot possibly foresee all issues that may need to be raised by motions at the outset of a case. The Local Rules do not require parties filing motions to have affirmative authorization in a scheduling order. To the contrary, they establish an orderly procedure for motions, requiring that they be filed a minimum of 35 days before hearing. L.R. 7-2(a). Defendants properly noticed and filed the motion under the Local Rules. The motion to exclude Dr. Singer's opinions is timely.[2]

II. PLAINTIFFS ARE NOT PREJUDICED BY THE FILING

Plaintiffs' claim that the motion to exclude Dr. Singer's opinions prejudices them borders on the frivolous. Plaintiffs are entitled to oppose the motion, and Defendants fully expect that they will. But Plaintiffs contend that obligation will somehow impede their preparation for arguments on the class certification motion. Even accepting that dubious assertion, that is not "prejudice" of any sort. The same could be said about discovery motions interrupting deposition

[2] Plaintiffs' complaints about Defendants' refusal to consent to allowing Dr. Singer to file yet another supplemental report make no sense. Plaintiffs had nearly 15 months to conduct discovery in this case. Dkt. #81 (opening discovery on July 1, 2013 and closing on October 20, 2014). They had ample opportunity to seek information from third parties and raise any discovery issues with the Court. Dr. Singer submitted an original report and a reply totaling 135 pages of opinions and exhibits. At some point, Plaintiffs and their expert must pick a theory and stick with it. Apparently, Plaintiffs want Defendants to respond to additional materials from Dr. Singer but claim for themselves an exemption from having to defend the admissibility of his work.

preparation or summary judgment motions interfering with trial preparation. Motion practice is a feature of litigation. That a party must respond to a motion does not constitute legal prejudice.

Likewise, that Defendants get a reply brief in support of their motion is not prejudice; it is a function of the Local Rules. Plaintiffs claim that the timing of the motion allows Defendants "to file a reply on central issues at play in class certification shortly before the hearing." Pls. Adm. Mot. at 3. That is true on every motion – the movant gets the last word. In any event, under the Local Rules, Plaintiffs will file their opposition three weeks before the hearing and Defendants their reply two weeks before the hearing. Plaintiffs' argument boils down to a contention that Defendants get a filing one week later than they do. That is not "prejudice."

III. DEFENDANTS' MOTION DOES NOT INCLUDE IMPROPER ADDITIONAL ARGUMENT ON CLASS CERTIFICATION

Finally, Plaintiffs claim that Defendants' motion is improper additional argument on the class certification motion. This contention merely repeats Plaintiffs' timeliness argument and fails for the same reasons. Their remaining points are not relevant to their motion to strike but go the merits of Defendants' motion to exclude Dr. Singer's opinions. Nonetheless, two matters deserve mention.

First, Plaintiffs' arguments on the merits belie their claim that they somehow are prejudiced by having to respond to Defendants' motion to exclude Dr. Singer's opinions.

Second, Plaintiffs contend that Defendants "make a number of false and misleading arguments in their Motion, which they would presumably expand upon in their reply." Pls. Adm. Mot. at 4. But the only example they cite is Defendants' supposed assertion that Dr. Singer's "opinions are the only evidence supporting Plaintiffs' certification motion." *Id.* Defendants never made any such argument. Plaintiffs' claim otherwise is selective quotation at its worst. Defendants' motion reads in pertinent part:

> Plaintiffs must develop a methodology that, with evidence common to the class as a whole, can establish "in one stroke[ ]" whether absent class members have suffered or will likely suffer antitrust injury. *On that essential issue*, Dr. Singer's opinions are the only evidence supporting Plaintiffs' certification motion.

Defs. Mot. (Dkt. #150-4) at 5 (emphasis added) (internal citations omitted). Defendants expressly limited their argument to evidence relating to a methodology to establish classwide antitrust injury. Plaintiffs' documentary evidence does not address that issue; Dr. Singer's opinions are the crucial evidence. Defendants' point was direct and accurate when made and remains so. Plaintiffs' liberties with Defendants' words match those they take with the content of the Local Rule 7-3(d)(1). Their motion should be denied.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' administrative motion to strike defendants' motion to exclude the opinions of Dr. Hal J. Singer offered on Plaintiffs' class certification motion.

Respectfully submitted,

November 7, 2014

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